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No. 84-1366

In the Supreme Court of the United States

OCTOBER TERM, 1984

BOARD OF EDUCATION OF THE CITY OF CHICAGO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly interpreted a consent decree between the United States and the Board of Education of the City of Chicago as requiring that the United States provide federal funds for purposes of desegregation in Chicago only from programs that could be used, consistent with the intent of Congress, to fund desegregation efforts.

2. Whether the district court's award of almost $104 million as a penalty for the United States' alleged "bad faith" under the consent decree was appropriate under the circumstances of this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 744 F.2d 1300. The findings of fact and conclusions of law of the district court (Pet. App. 18a-215a) are reported at 588 F. Supp. 132. The remedial order of the district court (Pet. App. 216a-233a) is reported at 592 F. Supp. 967. Earlier findings of fact and conclusions of law of the district court in this case and an accompanying order (Pet. App. 234a-268a) are reported at 567 F. Supp. 272. The prior opinion of the court of appeals (Pet. App. 269a-281a) is reported at 717 F.2d 378.

JURISDICTION

The judgment of the court of appeals (Pet. App. 297a) was entered on September 26, 1984, and the petition for rehearing was denied on November 30, 1984 (Pet. App.

298a). A petition for a writ of certiorari was filed on February 28, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1979, petitioner Chicago Board of Education (the Board) applied to the United States Department of Health, Education, and Welfare for a grant under the Emergency School Aid Act, 20 U.S.C. (Supp. V 1979) 3191 *et seq.* On April 9, 1979, HEW notified the Board that it was ineligible for a grant because the Chicago school system was racially and ethnically segregated in violation of the law, and the Board had failed to initiate an adequate plan to desegregate (Complaint ¶ 7). After the Board failed to rebut HEW's findings or to devise a satisfactory desegregation plan (*id.* at ¶ 8), HEW referred the matter to the Justice Department for appropriate enforcement action pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*. Another Emergency School Aid grant application from Chicago was rejected in 1980 for the same reasons (Complaint ¶ 4). Negotiations ensued between representatives of the Attorney General and of the Board.

On September 24, 1980, the United States filed a complaint in the United States District Court for the Northern District of Illinois, together with a proffered consent decree. The complaint alleged that the Board had established and maintained racial and ethnic segregation of students in the City of Chicago public schools in violation of the Fourteenth Amendment and Titles IV and VI of the Civil Rights Act of 1964, 42 U.S.C. 2000c and 2000d *et seq.*. The consent decree, entered by the district court the same day, required the Board to develop a plan to desegregate the

schools and to remedy the effects of past segregation of black and Hispanic students (Pet. App. 282a-284a).[1]

One of the principal topics of discussion during negotiation of the consent decree was the Board's concern that it not again be denied federal financial assistance for its schools (GX 1, Docket Nos. 18, 21, 22, 23a). The United States refused to guarantee federal funding "specific as to form and amount * * * in the context of the Consent Decree" (Pet. App. 27a-28a). The parties agreed, however, in paragraph 15.1 of the decree, that (Pet. App. 290a):

> Each party is obligated to make every good faith effort to find and provide every available form of financial resources adequate for the implementation of the desegregation plan.

The district court approved the desegregation plan formulated by the Board on January 6, 1983. 554 F. Supp. 912 (N.D. Ill. 1983). During the 1980-1981 school year, the Department of Education provided the Board two Title IV grants totalling $321,439, and an out-of-cycle Emergency School Aid grant of $1,813,025, all of which was available for implementation of the desegregation plan. During the school year 1982-1983, the Department of Education provided the Board $5.385 million in block grant funds, of

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[1]Petitioner asserts (Pet. 4) that the Board agreed to implement a desegregation plan because of a supposed "United States financial commitment." But the decree itself demonstrates that the Board was charged with maintaining a racially segregated school system (Pet. App. 282a, ¶ 1, 2) and that the Board settled the case to eliminate the "racial isolation" of students (*id.* at 282a-283a, ¶ 4) and to avoid the costs and risks of litigation (*id.* at 283a, ¶ 5).

which the Board chose to expend $1.8 million on the desegregation plan and the remaining $3.5 million on other educational programs. Pet. App. 236a.[2]

On May 31, 1983, the Board filed a "Petition * * * for an Order Directing Compliance by the United States with Provisions of the Consent Decree Concerning Financial Support." The district court issued Findings of Fact and Conclusions of Law on June 30, 1983 (Pet. App. 234a) and entered an order (*id.* at 259a). The district court concluded that the United States had violated its obligation under paragraph 15.1 in a number of ways. First, the court found that there were funds in the Department of Education's appropriation for Fiscal Year 1983 for which the Board was theoretically eligible: funds allocated under Title IV of the Civil Rights Act of 1964 for desegregation related purposes (42 U.S.C. 2000c-4), and at least some of the funds in the Secretary's Discretionary Fund (20 U.S.C. 3851(a)) (Pet. App. 255a-256a).[3] Additionally, the court found that the FY 1983 Title IV funds were appropriated along with funds for other programs into an account called "Special [Programs] and Populations" (*id.* at 256a). According to the court, there was nothing to prevent the Secretary from diverting other funds in this account to the Chicago Board (*ibid.*) The court held that the United States had violated paragraph 15.1 by failing to make "every good faith effort" to provide these "available" funds to the Board (Pet. App. 255).

Second, the court noted that in 1981, the Executive Branch had adopted a policy of phasing out categorical grants and grants to individual school districts in favor of

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[2]Petitioner's assertion (Pet. 6) that "the Executive Branch, including particularly the Department of Education, determined that no material financial assistance should be provided by the Federal government to the Board for its desegregation programs" is unsupported and untrue.

[3]The Secretary's Discretionary Fund is a small portion of the Education Consolidated and Improvement Act of 1981 (ECIA), 20 U.S.C. 3801 *et seq.*. Most of the ECIA is dedicated to block grants.

block grants to states for redistribution by the states to local school districts on a per capita basis. The court regarded this policy as a violation of the consent decree because it reduced the amount of funds potentially available to the Board.[4] Similarly, legislative initiatives of the Executive to reduce the total amount of federal financial assistance available to school districts, not to request larger appropriations from the Congress for Title IV or the Discretionary Fund, and to phase out direct grants under the Emergency School Aid Act, 20 U.S.C. (Supp. V 1979) 3191 *et seq.* were held by the court to violate paragraph 15.1 of the consent decree, notwithstanding the nationwide scope of these decisions (Pet. App. 236a-240a, 242a).

Additionally, the court found violations in the Secretary's refusal to seek congressional reappropriation of miscellaneous unused funds about to lapse into the Treasury so that these funds could be redirected for Chicago's desegregation plan (Pet. App. 244a-245a). The court reasoned that paragraph 15.1 bound the Executive Branch to use every power at its disposal to find and provide funding for the Board and that every failure to use those powers constituted a violation (Pet. App. 254a-255a). According to the district court, even if use of legislative-type powers were *not* contemplated by paragraph 15.1, the use of these powers to make funds *unavailable* demonstrated bad faith (Pet. App. 252a-253a).

Finally, the court concluded that the United States' "bad faith" had altered its obligation. Whatever that obligation had been originally, now the United States under paragraph

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[4]The structure of the ECIA allowed a greater number of school districts to use the funds for a larger variety of projects (including desegregation). This potentially, though not necessarily, reduced the amount of money available to a district such as Chicago, which previously (when not in violation of applicable laws, including the civil rights laws) had been eligible for categorical grants of funds to be used exclusively for purposes of desegregation.

15.1 was required to furnish funds in an amount equal to the difference between the funds budgeted by the Board and the amount "adequate for full implementation" of the desegregation plan. Pet. App. 262a-264a.[5]

The court issued a preliminary injunction prohibiting the United States from spending before August major portions of the Discretionary Fund and Special Programs and Populations Account, and directed the government to take steps to prevent the lapse of certain "excess" funds that might eventually be put to the use of the Board's desegregation plan (Pet. App. 265a-267a). In addition, the court enjoined the government to take certain administrative and legislative affirmative steps to find and provide additional funds for Chicago (*id.* at 264a-265a).

2. On the first appeal, the court of appeals held that paragraph 15.1 imposes a substantial obligation on the government to provide *available* funds to the Board (Pet. App. 276a), and that this obligation involves more than rendering procedural assistance (*ibid.*). The court specifically declined to address whether a finding of bad faith could be based upon legislative recommendations or policy decisions by the United States, or whether the court could direct the government to seek legislation (*id.* at 276a-277a). The court of appeals affirmed the district court's judgment on the narrower ground that the United States had breached the consent decree to the extent that there were funds available that the government had not given to Chicago (*ibid.*). At the same time, the court noted that the district court's findings regarding the availability of Title IV and Discretionary funds were contradictory and unclear (*id.* at 277a n.8). The court also held that, while a "temporary" freeze on the Secretary's ability to expend certain funds

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[5]That amount was found to be $14.6 million (*id.* at 264a); the source of that figure is unclear.

was appropriate, the district court acted with excessive dispatch by imposing a detailed remedy before giving the Executive Branch an opportunity to formulate a remedial proposal (*id.* at 279a).

3. Soon after the first appeal was decided, Congress took two actions that relate directly to this case. On October 1, 1983, Congress passed a temporary appropriation for FY 1984 in the form of a continuing resolution (Pub. L. No. 98-107, 97 Stat. 733 *et seq.*), which contained a provision inserted by Representative Yates of Chicago appropriating $20 million for the express purpose of funding the consent decree.[6] Three days later Senator Weicker introduced an amendment to the Senate version of the Department of Education Appropriation Act for FY 1984. That provision, which was designed to relieve other grantees from the district court's freeze (Pet. App. 184a-185a), ultimately was incorporated in the conference bill that passed on October 31, 1983 (Pub. L. No. 98-139, § 309, 97 Stat. 895). It provides:

> No funds appropriated in any Act to the Department of Education for fiscal years 1983 and 1984 shall be withheld from distribution to grantees because of the provisions of the order entered by the United States District Court for Northern District of Illinois on June 30, 1983: Provided, That the court's decree entered on September 24, 1980, shall remain in full force and effect.

In light of these congressional actions, the United States moved that the Board's petition be dismissed on the ground that the Yates bill fully satisfied any obligation that the United States might have under paragraph 15.1 of the

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[6]This provision was initially passed by Congress as a separate bill (Pub. L. No. 98-107, 97 Stat. 733 *et seq.*), and was vetoed by the President on constitutional grounds. See *Desegregation Funds for the Chicago Board of Education*, 19 Weekly Comp. Pres. Doc. 1133 (Aug. 13, 1983).

Decree and that none of the frozen funds were any longer even arguably "available" (Docket Nos. 363-364). The district court denied that motion on November 21, 1983 (Docket No. 379).

4. The district court held a status hearing on October 5, 1983, and decided that an evidentiary hearing was needed to determine the level of funding the Board needed to implement its desegregation plan. Rejecting the United States' contention that such a hearing exceeded the court of appeals' remand instructions, the court held a hearing in March 1984 and issued an opinion on June 8, 1984 (Pet. App. 18a).

In its June 1984 opinion, the district court reaffirmed its prior interpretation of paragraph 15.1 (Pet. App. 150a-151a, 156a-162a). It found that the Board's unfunded needs for implementation of the desegregation plan in the 1984-1985 school year totalled $103.858 million (*id.* at 165a). The court held that the United States was "obligated to make every good faith effort to find and provide" that sum (*ibid.*). The district court also found that the government had acted in bad faith by failing to provide certain funds, by failing to lobby the Congress for additional funds, by deciding not to provide direct grants to local educational agencies, by lobbying against passage of the Yates Bill, by seeking a different version of the Weicker Amendment, by redrafting certain administrative regulations, and by submitting an inadequate plan for funding the Board's efforts (Pet. App. 196a-200a). Because of paragraph 15.1 and the government's "bad faith," the court ruled that the Executive Branch promptly had to lobby Congress to obtain additional funds (Pet. App. 207a).

On August 13, 1984, the district court entered its remedial order (Pet. App. 216a). That order charged the United States with an obligation to provide the Board with

$103.858 million for implementation of its desegregation plan (*id.* at 226a-227a). The court further ordered the Executive Branch to take "every step within its legal authority" (*id.* at 226a) to provide that amount. Those steps, documented in the court's Conclusions Nos. 131-143 of June 8 (Pet. App. 48a-53a), were both administrative and legislative in nature. Such steps included reporting to Congress the substance of the court's opinion and the need for new funds, requesting reappropriations of excess 1983 funds (and, later, excess funds for subsequent years), requesting reappropriation of 1984 Department of Education funds, seeking Fiscal Year 1985 funds, taking other legislative initiatives to make funds available to the Board, and opposing legislation designed to make funds unavailable to the Board (*id.* at 202a-208a). The Order further directed the United States to turn over to the Board all $17.0 million of FY 1984 money remaining of the frozen Discretionary Fund, and one-half ($11.775 million) of the remaining frozen Title IV funds, by August 22, 1984 (*id.* at 227a-228a). The United States was required to formulate a plan by October 1 of each year to come up with the rest of the $103.858 million for this year and a similar amount for each school year for the foreseeable future (*id.* at 228a-231a).

5. The United States appealed the district court's 1984 opinion and remedial order. The United States' first argument on appeal was that the district court erred in interpreting paragraph 15.1 to require the Executive Branch to engage in legislative activity, to pay the difference between the Board's needs for implementation of its desegregation plan and the money it had budgeted for that purpose, and to award Title IV and Discretionary Funds to the Board without regard to other grantees. Pet. App. 8a. In support of its interpretation, the United States contended that it would not have agreed to fund all of the Board's desegregation costs at the expense of other grantees contrary to the purposes of the applicable appropriations statutes, nor to

relinquish its constitutional authority to formulate policy and engage in legislative activity. The United States also contended that, even if the district court were correct in its interpretation of paragraph 15.1, that portion of the decree would be unenforceable because it would be inconsistent with the constitutional allocation of powers (Pet. App. 8a).

In the decision petitioner urges this Court to review, the court of appeals never reached the constitutional issues. Rather, in reliance on the intent of the parties, it rejected the district court's interpretation of paragraph 15.1 of the decree (Pet. App. 12a). "After closely examining the extrinsic evidence surrounding the adoption of ¶ 15.1," the court of appeals ruled that the parties did not "ha[ve] any federal funding sources in mind other than programs that could be used, consistent with the intent of Congress, to fund school desegregation efforts" (*id.* at 13a). The court ruled (*id.* at 11a) that the government's funding obligations under the decree are satisfied by funding the Board on a priority basis under existing school desegregation programs in accordance with program criteria. Therefore, the court held, "¶ 15.1 does not require the government to engage in legislative activities in order to make desegregation funds available" (*id.* at 14a).

Because of this construction of paragraph 15.1, the court of appeals found erroneous the district court's conclusions that the United States acted in bad faith by failing to request congressional appropriations for the Board (Pet. App. 13a-14a). The court also held that the decision not to reprogram funds for use by the Board was not bad faith (*id.* at 14a & n.9). With respect to the Executive Branch's policy decision to redirect federal educational funding toward block grants instead of categorical grants, the court of appeals ruled that this did not constitute bad faith because the decision applied to all school districts and did not demonstrate intent by the United States to avoid its obligations under the decree (*ibid.*). The court did not reach the question whether the

United States acted in bad faith by lobbying against passage of the Yates Amendment and for changes in the Weicker Amendment, because it held that the award of $103.858 million as a penalty for such bad faith was an abuse of discretion. The order was "unreasonable," since it would leave no federal desegregation money for other school districts. *Id.* at 15a. If any remedy were required, the "proper remedy for any bad faith violations of the Decree in connection with the Yates-Weicker activities would have been a civil contempt citation under which the district court could have ordered the government either to refrain from specific efforts to make desegregation funds unavailable to the Board or to inform Congress about the funding obligations of the government under the Decree" (*id.* at 15a-16a). Since the "time for such a remedial measure has passed," however, the court of appeals did not need to resolve whether in fact the government's Yates-Weicker legislative efforts were in violation of the decree (*id.* at 16a).

The court of appeals found it unnecessary to consider whether the Executive Branch's congressional lobbying activities are reviewable by the judiciary (Pet. App. 16a). The court remanded the case for a determination of "whether the Board is receiving the maximum level of funding that is available under the criteria of programs through which funds for desegregation can be disbursed" and, if the Board's needs are still unmet, whether the government has fulfilled its " 'duty to search among funds that Congress had indeed made . . . available' " (*id.* at 13a, citing district court transcript of April 5, 1984, at 1416 (ellipsis supplied by the court of appeals)).

ARGUMENT

As this case reached the court of appeals, it appeared to present grave constitutional issues of great significance. The district court had interpreted a consent decree entered into by the United States as plaintiff and the Board as defendant, providing that both parties would "make every good faith

effort" to find and provide available funds for the desegregation plan, as requiring the United States to meet the Board's annual budgetary shortfall, which exceeds $100 million. The district court further presumed to determine that the President's legislative program before the Congress, including a major restructuring of federal educational assistance affecting every school district in the nation, constituted a "bad faith" violation of the consent decree, and purported to enjoin the Executive Branch to change that legislative program in specific ways in compliance with the district court's views of how money might be found for Chicago. Obviously, the court's order intruded deeply and impermissibly into the political functions and discretion of the Executive Branch.

The court of appeals, however, declined to address any of the constitutional difficulties created by the district court's order. It simply interpreted the consent decree as it was written, in light of extrinsic evidence of the intent of the parties.

As the case reaches this Court, therefore, no constitutional issues remain. All that is presented for this Court's review is the court of appeals' sensible, fact-bound interpretation of one consent decree. Petitioner's attempt to raise constitutional questions where none exist should be rejected.

1. Petitioner contends (Pet. 20) that the "rule of law" is somehow "undermined" by the decision below, apparently because the court of appeals allegedly construed the consent decree in light of separation of powers principles. However, the opinion below belies any such suggestion. Although petitioner suggests that the decision "obviously derived" from the appellate court's constitutional concerns (Pet. 18), petitioner cannot point to a single word in the court's opinion indicating that such considerations played any role in its construction of the meaning of the consent decree (compare

Pet. 22-26 with Pet. App. 9a-13a).[7] Indeed, it is clear from the court's opinion that its interpretation of paragraph 15.1 was based on the words of the agreement and the extrinsic evidence of the intent of the parties. In an excerpt typical of its analysis, the court of appeals explained (Pet. App. 13a):

> After closely examining the extrinsic evidence surrounding the adoption of ¶ 15.1 into the Decree, we must conclude that there is inadequate support for the district court's interpretation. In the parties' stipulation regarding the negotiations leading to the adoption of ¶ 15.1, we find no indication that the parties had any federal funding sources in mind other than programs that could be used, consistent with the intent of Congress, to fund school desegregation efforts. To the extent that the district court reads the June 19, 1980, letter from Assistant Attorney General Drew Days to the Board as indicating that the parties contemplated legislative initiatives on the part of the Executive Branch to make funds available, *see* 1984 Conclusion of Law No. 139, we find this reading to be clearly erroneous. The applicable wording in this letter tracks the language in ¶ 15.1 and does not amplify or further explain the parties' intent.

The court of appeals never stated that the Executive can "irrespective of the Decree, make any decision it wants" (Pet. 22); indeed, it stated just the opposite (Pet. App. 11a n.7 ("¶ 15.1 binds the Secretary of Education's discretion with respect to funds that may be used for school desegregation pursuant to congressional appropriation")). Nor, obviously, did the court of appeals hold that a consent

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[7]We do not mean to imply that there would be anything amiss had the court adopted a construction of the consent decree to avoid unnecessary constitutional questions (see *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring); *Alliance to End Repression* v. *City of Chicago*, 742 F.2d 1007 (7th Cir. 1984) (en banc)). We simply note that the court of appeals in fact interpreted the decree without reliance on any such canon of construction.

decree *cannot* constrain the discretionary decisionmaking authority of the Executive Branch (cf. Pet. 22-23). Rather, the court held that *this* decree, when interpreted in accordance with its language and the parties' intent, did not require the United States to do what petitioner sought.

For this reason, the court of appeals did not reach a second issue raised by petitioner, *i.e.*, whether a court can compel the Executive Branch to engage in legislative lobbying (Pet. 26-28). Such a ruling would not have been proper, given the court's interpretation of the decree as not requiring such activity (Pet. App. 129a). In sum, petitioner seeks review of issues the court below did not consider and reversal of rulings it did not make.[8] See *Smith* v. *Butler*, 366 U.S. 161 (1961) (writ of certiorari dismissed when the decision below did not turn on issues on the basis of which certiorari was granted); *United States* v. *Rimer*, 220 U.S. 547 (1911) (same); cf. *Conway* v. *California Adult Authority*, 396 U.S. 107 (1969) (writ of certiorari dismissed where subsequently discovered facts rendered the issue on which certiorari was granted hypothetical).

2. The only issue arguably encompassed within petitioner's first two questions presented that is ripe for review is whether the court of appeals properly construed paragraph 15.1. However, the court of appeals' interpretation was based largely upon a careful examination of the facts illustrating the intent of the parties (Pet. App. 9a-13a); the

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[8]To be sure, the United States argued below that, even if the parties had intended the Executive Branch to engage in particular lobbying activities, the judiciary could not, consistent with the constitutional separation of powers, order the Executive Branch to do so (see Pet. App. 8a). We adhere to that position. But since the court of appeals properly interpreted the decree as not requiring the Executive Branch to undertake particular legislative activities and never considered the constitutional issue, we will not burden this Court with a lengthy response to petitioner's hypothetical arguments.

court's fact-specific conclusion does not warrant further review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

The court of appeals' interpretation, in any event, is clearly correct. The language of the consent decree does not permit the construction that the Executive Branch undertook to engage in legislative lobbying or to guarantee with federal funds the Board's annual assessment of its unmet needs. Paragraph 15.1 obligates the United States to make a good faith effort to "find and provide * * * every *available* form of financial resources" for the Board's desegregation plan (emphasis added). The term "available" is a common term in appropriations law; it means funds that have been appropriated for a given purpose by Congress under Article I, Section 9 of the Constitution. An appropriations bill, by its nature, limits the availability of funds for obligation to specified purposes, time, and amount. See GAO, *Principles of Federal Appropriations Law* 3-2 (1982). Unless funds have been appropriated for that purpose and that time, they are not "available" as that term is ordinarily understood.

Moreover, as the court of appeals pointed out (Pet. App. 13a), no extrinsic evidence suggests that "the parties had any federal funding sources in mind other than programs that could be used, consistent with the intent of Congress, to fund school desegregation efforts." It is fanciful to suggest that the United States would have agreed to commit to the Board all funds in the Secretary of Education's Discretionary Fund and one-half of all funds in the Title IV account (in contravention of the valid statutory criteria and policy decisions that would otherwise govern the Secretary's distribution of these funds among potential grantees) in order to settle a lawsuit in which the United States was plaintiff (with no potential monetary liability) and petitioner the defendant.

In any event, petitioner does not directly challenge the court of appeals' interpretation of the decree, except to suggest incorrectly that it rested on certain constitutional principles. For reasons stated above, that suggestion does not raise any issue warranting further review.

3. Petitioner's final question presented concerns the remedies available against the Executive Branch for violation of a consent decree (Pet. 28-29). The district court awarded the Board $103.858 million in federal funds for the first year and required the United States to develop a plan for payment of a similar amount in each subsequent school year (Pet. App. 228a-231a). The justification for this award was a variety of violations summarized by the district court as: failing to provide available funds, lobbying against legislation to provide federal funds, lobbying for legislation to make funds unavailable, and otherwise acting to make funds unavailable (*id.* at 220a). Petitioner suggests the award was necessary to make it whole for these "violations" (Pet. 28).

But the court of appeals found that the United States' activities were not in violation of the decree (Pet. App. 13a). The court of appeals also reversed the district court's finding that the Executive Branch acted in bad faith by failing to lobby Congress for funds, since such behavior was not required by the decree (Pet. App. 13a-14a). Similarly, the court found erroneous the trial court's view that the failure to provide direct categorical grants showed bad faith, because that "policy decision applies to all school districts and does not indicate intent on the part of the United States specifically to avoid its obligation under ¶ 15.1" (*id.* at 14a). Finally, the court ruled that it was an abuse of discretion to award almost $104 million because the United States lobbied against the Yates Amendment and for changes in the

Weicker Amendment.[9] The court of appeals reached this conclusion because the record demonstrated that this penalty would have resulted in no federal desegregation money being available for other school districts (Pet. App. 15a). When viewed in this light, there is no merit in petitioner's suggestion that the district court's order merely restored petitioner to the position it would have been in but for the violation (Pet. 28).

Accordingly, this case does not, as petitioner contends (Pet. 28), raise the "critical issue" of "whether there is a limitation on the powers of an Article III court to remedy violations of the Decree by steps which go beyond merely stopping the complained of activity." The court simply found that the district court abused its discretion by ordering an enormous and disproportionate monetary remedy without regard to the consequences. This holding presents no question of general applicability requiring review by this Court.

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[9]The court of appeals reserved the question whether the President's submission of a section of the Department of Education's Fiscal Year 1984 budget to Congress constituted bad faith (Pet. App. 16a-17a). This issue was noted as a possible issue on remand to the district court and is in an interlocutory posture (*ibid.*). Moreover, the court of appeals did not decide whether the Executive Branch's (unsuccessful) legislative activities with respect to the Yates and Weicker amendments were in bad faith violation of the decree, because, even assuming they were, the "time for [the proper] remedial measure ha[d] passed" (*id.* at 16a). While we do not consider the President's interactions with Congress to be judicially reviewable, and disagree with the court of appeals about what remedy would be "proper" (*id.* at 15a) in this context, the court's disposition of the issue makes unnecessary any review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submi'ted.

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